

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLOTTE DOZIER,

Plaintiff,

CIV-S-03-1453 GGH

vs.

MICHAEL J. ASTRUE,<sup>1</sup>  
Commissioner of  
Social Security,

ORDER

Defendant.

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Counsel's motion for attorney's fees, filed November 15, 2006, is pending before the court. Defendant filed on December 6, 2006 a response expressing no opinion, but submitting points for the court's assistance. Counsel requests attorney's fees in the amount of \$10,587.25. The case is before the undersigned pursuant to 28 U.S.C. § 636(c) (consent to proceed before a magistrate judge).

Counsel realizes that she has filed this motion belatedly, and then some. She claims that the motion was timely prepared in August 2005 (the time at which the Commissioner

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<sup>1</sup> Michael J. Astrue became Commissioner on February 12, 2007. Accordingly, he should be substituted as defendant in this suit. Fed. R. Civ. P. 25(d)(1). No further action need be taken by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

1 announced the award and the amount to be withheld for attorneys' fees, but inadvertently not  
2 filed until late 2006). As a "sort of" excuse, she claims that the scheduling of attorneys' fees  
3 motions was not set forth in the scheduling order.

4           The undersigned has never seen an initial scheduling order in this district attempt  
5 to schedule a motion for attorneys' fees, and event the need for which is unknowable at the time  
6 of the scheduling order's issuance. The timing of attorneys' fees motions is covered by Fed. R.  
7 Civ. P. 54 and Local Rule 54-293. However, the filing of 42 U.S.C. § 406(b) motions for  
8 attorneys' fees presents special complications. Both the Federal Rules and the Local Rules time  
9 the motions from the date judgment is entered. However, a successful plaintiff in a judgment in  
10 a Social Security case can only achieve an indefinite verdict, i.e., at best, the matter must be  
11 remanded to the Commissioner for a calculation of benefits. Because the amount of attorneys'  
12 fees is keyed to the ultimate, gross benefits number calculated on remand, it would make no  
13 sense to make a motion for attorneys' fees immediately after a remand judgment as such a  
14 motion would always have to be held in abeyance, in some cases up to a year. There is no rule  
15 which specifically governs the Social Security § 406(b) situation.

16           Given the lack of a governing rule, and the lack of objection by the plaintiff who  
17 was served with the request, the court will assess the request for attorneys' fees on the merits.

18           Attorneys are entitled to fees for cases in which they successfully have represented  
19 social security claimants:

20           Whenever a court renders a judgment favorable to a claimant under  
21 this subchapter who was represented before the court by an  
22 attorney, the court may determine and allow as part of its judgment  
23 a reasonable fee for such representation, not in excess of 25 percent  
24 of the total of the past-due benefits to which the claimant is entitled  
25 by reason of such judgment, and the Commissioner of Social  
26 Security may, notwithstanding the provisions of section 405(i) of  
this title, certify the amount of such fee for payment to such  
attorney out of, and not in addition to, the amount of such past-due  
benefits.

42 U.S.C. § 406(b)(1).

1           Rather than being paid by the government, fees under the Social Security Act are  
2 awarded out of the claimant's disability benefits. Russell v. Sullivan, 930 F.2d 1443, 1446 (9th  
3 Cir. 1991). The Commissioner has standing to challenge the fee award. Craig v. Secretary,  
4 Dept. of Health & Human Serv., 864 F.2d 324, 328 (4th Cir. 1989). The goal is to provide  
5 adequate incentive for representing claimants while ensuring that the usually meager disability  
6 benefits received are not greatly depleted. Cotter v. Bowen, 879 F.2d 359, 365 (8th Cir. 1989).

7           The 25 percent statutory maximum fee is not automatic. The court also must  
8 ensure that the fee request is reasonable. Gisbrecht v. Barnhart, 535 U.S. 789, 807, 122 S. Ct.  
9 1817, 1828 (2002) (reversing downward adjustment of attorney's fees based on lodestar  
10 calculation). The Gisbrecht court suggested that the claimant's lawyer should submit a record of  
11 hours spent and a statement of the lawyer's normal hourly billing charge to assist the court in  
12 concluding that the fee sought is reasonable. Id. The character of the representation (including  
13 matters such as attorney caused delay), or the nature of the results achieved might, in a proper  
14 case, justify downward adjustment from the statutory maximum fee. Id.

15           Counsel has attached to his motion a letter from the Commissioner advising  
16 plaintiff that the Social Security Administration is withholding 25% of plaintiff's past due  
17 benefits, or \$10,587.25 to pay attorney's fees. Plaintiff's Exhibit 2. Counsel requests a fee in the  
18 amount of \$10,587.25. Counsel has submitted a copy of a standard social security case 25%  
19 contingency fee arrangement, together with a statement documenting 31.20 hours expended on  
20 matters before this court. The court finds the amount of hours expended to be reasonable. The  
21 requested fee divided by the hours expended constitutes an hourly billing rate of approximately  
22 \$339.33/hour. While the hourly rate yielded is substantial, the court finds \$10,587.25 to be a  
23 reasonable fee in light of the contingency arrangement between plaintiff and her counsel, the  
24 hours expended, the quality of counsel's representation, the results achieved, and an offset for  
25 already awarded EAJA fees.

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1           Accordingly, counsel's request for attorney's fees in the amount of \$10,587.25 is  
2 GRANTED. Counsel has previously been awarded EAJA fees in the amount of \$3,800. The  
3 Commissioner is directed to pay the fee forthwith and remit to plaintiff the remainder of her  
4 withheld benefits. Counsel shall reimburse plaintiff in the amount of \$3,800 which shall not be  
5 deducted from plaintiff's past due benefits.

6 DATED: 5/16/07

/s/ Gregory G. Hollows

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GREGORY G. HOLLOWS  
UNITED STATES MAGISTRATE JUDGE

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